EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms A Mansfield **v** Corps Security (UK) Limited

Heard at: Bury St Edmunds Employment Tribunal

On: 11, 12, 13,14 April and 19, 20 October 2023

Before: Employment Judge K J Palmer (Sitting alone)

Appearances
For the Claimant: Ms Joanna May (Solicitor)
For the Respondent: Ms Christi Scarborough (Counsel)

RESERVED JUDGMENT
Pursuant to a six day hearing conducted by CVP

1. It is the judgment of this Tribunal that the Claimant's claim for constructive unfair dismissal fails and is dismissed.

REASONS

1. The Claimant presented a claim to this Tribunal in an ET1 presented on 2 July 2021. In it she claims unfair dismissal. The claim is based upon her resignation and is a claim for constructive unfair dismissal.

2. This hearing was conducted over a period of six days with a significant break in the middle when the hearing was part-heard. It was unfortunate that it was not possible to reconvene the hearing more swiftly due to illness.

3. Accordingly, four days took place on 11, 12,13 and 14 April 2023 and the final two days took place on 19 and 20 October 2023. On 19 October, I heard from the parties with their submissions, both in writing and orally, where they considered it was necessary.

4. I took 20 October to write this Judgment.

5. During the course of this hearing I heard evidence from the Claimant and for the Respondent from five witnesses. I heard from Andrew Crowhurst, Gary Sapstead - Site Manager at RAC Wyton, Huntingdon, Jake Lacey – Contract Manager, Paul Cloke – Regional Manager and Paul Tyce – Contracts Manager.

6. The Respondents are a company specialising in security. They are contracted by RAF Wyton to provide security services at the RAF base in Huntingdon. Through a contract with the RAF the Respondents provide 22 security officers at RAF Wyton, working on shift patterns. Gary Sapstead is the Site Manager. The Claimant worked as a security officer for the Respondents at RAF Wyton. She commenced work in 2016. Her employment terminated pursuant to her resignation submitted on 2 March 2021. She claims constructive unfair dismissal based on the Respondent's alleged repudiatory breaches.

7. I have before me a list of issues and it was common ground what the issues were before this Tribunal and the alleged breaches the Claimant sought to rely upon. The Claimant pursues her case on the basis of the "last straw" doctrine.

The Issues

8. It is the Claimant's case, that at the time of the Claimant's resignation, the Respondent was in fundamental breach of contract by virtue of breach of the implied term of mutual trust and confidence. The alleged breaches are as follows:

    a. The treatment of the Claimant by the Respondent whilst she was on sick leave to include:

        (i) Failing to pay her in full for October 2020,
        (ii) Failing to respond to her emails and phone calls,
        (iii) Pressurising her to return to work before she was fit to do so, and
        (iv) Questioning the authenticity of the Claimant's sick notes.

    b. The breakdown in the working relationship between Gary Sapstead and the Claimant, due to the allegations of his failure to correctly complete an accident report information form. Bullying and pressurising the Claimant to return to work and into undergoing an occupational health assessment, unreasonably questioning the advice of the Claimant's GP and specialist, breaching the Claimant's confidentiality and shouting at, and being aggressive to the Claimant at a meeting on 3 February 2021 and on other occasions.

c. An allegation of an unfair grievance procedure and an unreasonable outcome.

d. An allegation of an unreasonable and unfair disciplinary procedure.

9. The Claimant relies upon the last straw doctrine, the last straw being the initiation and conduct prior to her resignation of an unreasonable and unfair disciplinary process.

10. The Claimant argues that the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent.

11. Both parties were professionally represented and I had before me, detailed written submissions and authorities for which I am most grateful. Ms Scarborough spoke at length to her written closing submissions. Mrs May was happy for the written submissions to sit without further elaboration.

Findings of facts

12. The Claimant was employed by the Respondents as a security officer between 27 May 2016 and 2 March 2021 when she resigned by letter with immediate effect.

13. She was one of 22 security officers employed at RAF Wyton, under a contract entered into between the Respondent and the RAF. The Claimant was employed by the Respondent. She worked on site pursuant to that contract.

14. This Judgment is confined to making findings of fact necessary and relevant to the allegations of breach, upon which the Claimant relies.

15. The first breach which the Claimant relies upon is that she lost a day of holiday wrongly attributed when she was on sick leave. The issue arose because, on 26 October 2020, the Claimant was recorded as taking a days' holiday when she was actually off sick. The Respondent's system does not allow cancellation of allocated holiday once it has been entered and ultimately the Respondents determined that they would increase the Claimant's allocation of holiday for the period 1 April 2020 to 31 March 2021, by one day to compensate. As a result, this was rectified, by the Respondent and was upheld in the Appellant's grievance, the outcome of which was sent to her by letter by Paul Cloke on 26 February 2021. At the same time, it was discovered that there had been an unintentional underpayment to the Claimant of £2.14. This was repaid in February 2021 pursuant to it being discovered.

16. There were also some anomalies in the Claimant's pay when she was on sick leave in October 2020 but these were resolved by Paul Cloke, pursuant to an email exchange between the Claimant and Paul Cloke.

Paul Cloke explained sickness pay during October and November and indicated that any discrepancies would be dealt with in subsequent payslips. His intervention prompted a thank you email from the Claimant on 5 December 2020.

17. One of the Claimant's claims which she says collectively amounted to a repudiatory breach with the other allegations, is the failure of the Respondents to answer emails and queries in a timely manner.

18. Considering and examining the evidence before me, I agree with Ms Scarborough's assessment that there was a considerable volume of email traffic emanating from the Claimant and that in the majority of instances, those emails received a swift response. However, Mr Lacey admitted in his evidence that he had failed to respond to the Claimant in relation to queries about her lost day's holiday. It is the Respondent's assertion that in any event, this was a minor issue and was ultimately dealt with by the Respondents and rectified. Mr Lacey is the contract manager covering the Midlands area. He has a portfolio of manned guarding contracts to manage. One of those contracts is at the RAF Wyton base. Mr Lacey had had involvement with the Claimant during the course of her employment and was involved in allegations the Claimant raised about a work colleague, Mandy Towle in April 2020.

19. Under cross-examination Mr Lacey admitted that there had been emails from the Claimant in October 2020 and early November, to which he did not reply. Ultimately, the Claimant had to follow this up with Mr Sapstead and did not receive final redress until she pursued a grievance which was dealt with by Mr Cloke.

20. There were clearly some failures here in this respect by Mr Lacey and the Respondents in general in that it took time for the issue of the days' holiday and the £2.14 to be rectified.

21. However, it is the Tribunal's view that these failures are relatively minor and whilst irritating and arguably distressing for the Claimant, are not significant. The vast majority of the time or the Claimant's correspondence was dealt with by the Respondents in a timely manner and in general, the respondents reacted with reasonable speed and diligence to her enquiries.

22. Ms Scarborough directs me to the fact that the Claimant considered a response to a query or an email with which she disagreed, as amounting to no response. She directs me to the exchange of emails between the Claimant and Andy Crowhurst on 24 and 25 February, as an example of this.

23. I agree with Ms Scarborough that it is important to view the exchange of communications between the Claimant and the Respondents as a whole. Viewed in that way I find nothing unusual about the response time.

24. The Claimant also argues that she was pressurised to return to work before she was fit to do so and there was questioning of the authenticity of her sick note. I accept Ms Scarborough's argument that there is no evidence before me to support the assertion that the Claimant was pressurised to return to work. The enquires that were made of her were, in my judgment, entirely in keeping with an Employer seeking to be updated on an employee's condition.

25. The Claimant relies upon an email from Jake Lacey, dated 6 November 2020 at 3.59 pm where he says:

> "Not sure if you got my missed call, can you confirm if you are returning on Monday".

The Claimant replied to that email at 5.54 pm reminding Mr Lacey that in a telephone call between them on 5 November, she had indicated to him that she did not feel ready to return to work. She argues that this should have been enough and there was no need for Mr Lacey to email her on 6 November. However, her sick note was due to expire on 8 November. There was no further sick note in place to cover the period going forward. Whilst the Claimant had indicated she did not feel ready to return, that does not alter the fact that no sick note was in place to cover the period going forward. It is not, therefore, unreasonable for Mr Lacey to seek clarification.

26. The Claimant suffered an injury at work on 30 July 2020, due to the fact that she had to manually close a significant bomb door, known as the tiger trap door, which should have opened and closed automatically but which was broken. This door is the property and operational responsibility of the RAF over which the Respondent has no control. The RAF were waiting for a motor part to repair the door which rendered it inoperable as an automatic door, such that it had to be operated manually. The door was very heavy and as a result the Claimant injured her lower back. The Claimant then experienced significant pain thereafter but continued to work. She was absent between 3 and 7 August 2020, returning to work on 10 August. Her absence was, however, not sick leave but was pre-booked annual leave.

27. After the accident on 30 July, on 31 July, the Claimant went to work and informed Gary Sapstead, her Manager, of the incident. It was necessary to complete an accident report. Gary Sapstead assisted the Claimant in completing this report. It is common ground between the parties that Mr Sapstead failed to record on the incident report form, that there had been MOD visitors who witnessed the incident. Under cross-examination he could not explain why he had failed to do this. In her evidence, the Claimant goes further and says that Mr Sapstead had completed the form, indicating that the Claimant had not suffered any injuries. This was not the case in the form that was before me. Interestingly, the Claimant said that she only realised this alleged omission when she saw the form in the bundle to be before the Tribunal. This is most odd as the form in the bundle does not show this. The form in the bundle clearly sets out the

nature of the injury and how it happened. I can only conclude that when compiling her Witness Statement the Claimant had misinterpreted the document in the bundle. Nevertheless, there was an error in the form. That was that Mr Sapstead had circled that there were no witnesses.

28. Ms Scarborough asked me to consider that this is a minor error and I agree with her. It is a minor error and of little significance.

29. The Claimant continued to be in considerable pain and on her return to work on 10 August, she was told she had to attend a return to work meeting with Gary Sapstead. She argued that this was inappropriate as she had not been signed off work and had actually been off between 3 and 7 August on pre-arranged leave. Gary Sapstead elevated this issue to the Respondent's HR team. The HR team in the form of Magda Jablonska El-aasar, confirmed that in circumstances where there had been an injury or sickness, it was necessary for a return to work form to be completed irrespective of the fact that the Claimant had been off on pre-arranged leave between 3 and 7 August. She was therefore required to attend a return to work interview. This took place on 11 August 2020. The Claimant continued to suffer pain. She continued to work but on 6 October she spoke to Linda Spelvings who was standing in for Gary Sapstead who was on holiday. She explained that she was struggling to go up and down stairs and complete external patrols due to the pain she was suffering. She regarded Linda Spelvings as not being very considerate or understanding. The Claimant continued to struggle. In her evidence she says that those around her, including Mandy Towle, were unsympathetic albeit that Patricia West was.

30. It is worth remembering that, in the past, the Claimant had experienced difficulties in her relationship with Mandy Towle and had, in fact, raised a complaint about her which had previously been investigated by the Respondent. The outcome was that there was no corroborating evidence to support either parties testimony and that no further action would be taken.

31. The Claimant then went home. On 7 October 2020 she was sick and was signed off sick until 26 October but subsequently continued to be signed off until her ultimate return on 1 December. It was during October that the anomaly with the pre-booked one days' holiday occurred when the Claimant was off sick.

32. When the Claimant returned to work it was on the basis of her specialist's recommendation that she do so on the basis of adjusted duties. Essentially, these adjusted duties were that she should avoid pushing, pulling, climbing or descending stairs or heavy lifting. She needed to mobilise gently and avoid prolonged sitting or standing. It was intended that such adjustments would remain in place until 31 January.

33. On the Claimant's return to work she was required, of necessity, to attend a return to work interview. The Respondents decided that Mr Lacey

should conduct the interview in light of the difficulties the Claimant perceived she had experienced with a previous return to work interview with Mr Sapstead. Mr Sapstead was anxious to avoid similar problems.

34. There is some considerable conflict as to what happened at this return to work interview with Mr Lacey on 2 December 2020. Mr Lacey said that the Claimant was particularly difficult and obstructive during the course of attempting to complete the return to work questionnaire. He said he was doing his best to complete it and I accept his explanation. There is a mistake in the form where he has incorrectly filled in the start date and end date of sickness as 30 November. But it is clear this is just a minor error. I accept his evidence that the Claimant was obstructive and reluctant during this interview and that her attitude was unhelpful and defensive.

35. It may be a convenient moment for me to comment generally on the Claimant's evidence.

36. I found that in the giving of her live evidence the Claimant was evasive. Questions put to her by Ms Scarborough, which she clearly did not like, she simply attempted to avoid answering. Her manner was defensive and obstructive. Of course, anyone giving evidence in a Tribunal is under stress and it is often the case, that witnesses and parties find it very difficult to give evidence when on Oath. Employment Judges are experienced at recognising this and wherever possible look beyond it. It is particularly difficult for Claimants who are pursuing a case against former colleagues who may be sitting in the same room. I have taken all of this into account and still find that the Claimant was often unclear in her evidence and seemed to be deliberately attempting to avoid legitimate questions put to her. On a couple of occasions I had to intervene to insist that she answer the questions.

37. I accept and understand that she is giving evidence in circumstances where she genuinely feels that she has been wronged or mistreated by the Respondents and in particular, Mr Sapstead and Mr Lacey. However, even allowing for this, I was not impressed with her evidence. I can see how difficult it would be for Mr Lacey and Mr Sapstead and others, in their dealings with the Claimant, in the course of the events which this Tribunal has examined. I do not, for one moment suggest that the Claimant had deliberately sought to mislead this Tribunal. She has, however, avoided questions and clearly genuinely feels that she has been poorly treated by the Respondent.

38. This is a subjective view of hers.

39. On the contrary, in respect of the evidence I heard from Mr Lacey, Mr Sapstead, Mr Cloke and the other witnesses of the Respondent, I need to draw no such similar conclusion. They all gave their evidence clearly. Both Mr Sapstead and Mr Lacey accepted that there were errors in the forms they had completed and, on occasion, could not give good reason why those errors occurred. They were, however, clear and straightforward.

Mr Lacey also accepted that he failed to respond to the Claimant's emails and telephone calls on occasion.

40. However, I am drawn to the conclusion that the Claimant's evidence must be treated with a degree of caution.

41. Where there is conflict on the evidence, in particular relating to the incidents the Claimant relies upon as being the repudiatory breaches of contract, I prefer the evidence of the Respondents.

42. Accordingly, I prefer the evidence of Mr Lacey as to the return to work meeting on 2 December.

43. I am drawn to this conclusion for the reasons I set out above and also for the reasons drawn to my attention by Ms Scarborough in her submissions.

44. The Claimant's recollection of the meeting with Mr Sapstead when the accident and report form was completed is clearly flawed. She argued, as I have indicated above, that Mr Sapstead had recorded "there was no injury" and that she had notice this on the form when she had received the bundle. That is clearly not the case. The document in the bundle in front of me clearly indicated that there was an injury. As Ms Scarborough points out, I did give the Claimant and her Representative an opportunity of producing a document in the terms she indicated but none was forthcoming.

45. Her version of events with respect to the incident on 9 April 2020, which is not one of the breaches relied upon, is also flawed.

46. She seemed to believe that those at the Respondents were engaged in some kind of conspiracy to remove her. There is no evidence before me to support such a conclusion.

47. In this respect I am therefore in agreement with Ms Scarborough's submissions.

48. I don't doubt the genuineness of the Claimant's subjective belief in the fact that there was something of a conspiracy but this is not borne out by the evidence before me and is unreasonably held by her.

49. The Claimant refused to sign the return to work form pursuant to the meeting with Mr Lacey. The Claimant was approached by the Respondent in the shape of Mr Sapstead in early January 2021. The Claimant had produced a further sick note on 4 January 2021, indicating that she would be limited due to chronic back pain until at least the end of January. The Respondents had sought to deal with adjustments to her role but it was felt that it was necessary to seek further professional input. It was on that basis that Mr Sapstead approached the Claimant to ask for her consent to be examined by an occupational health specialist. The Claimant seems to have taken great umbridge at this suggestion. She characterises this approach as Mr Sapstead and the Respondent questioning the authenticity of her sick note.

50. I do not accept that. I accept the Respondent's position that it was entirely appropriate in circumstances where the Claimant had returned to work with a back injury sustained at work, and had medical advice indicating that she perform restricted duties. It was only responsible and proper for an employer in those circumstances to seek more specialist evidence from those with greater expertise as to adjustments in the workplace to enable them to properly manage and assist the Claimant in the performance of adjusted duties. I see no evidence, and have heard no evidence, to suggest to me that this amounted to questioning the authenticity of the Claimant's sick notes and medical evidence she had, to that point, produced. She unreasonably refused to undertake an occupational health assessment. The Claimant also objects to the fact that at the meeting, another colleague of Mr Sapstead's, Louise Titmarsh, was present. I see no justification for such an objection. The objection was raised by the Claimant in her evidence on the basis of the fact that sensitive medical personal information was likely to be discussed. I do not accept that it was ever likely to be discussed or was indeed discussed. I accept Mr Sapstead's position that the only thing discussed was whether the other Claimant would consent to such a report. I accept the Respondent's position that Ms Titmarsh's presence was there to assist the Claimant and that she also needed also to be present to run the control room while Mr Sapstead was occupied. She was also there as an independent witness in light of the fact that the Claimant clearly had difficulties in her relationship with Mr Sapstead.

51. One of the alleged breaches the Claimant relies upon is unreasonable treatment by Mr Sapstead. I have dealt with this factually in part, so far. To summarise, I do not accept that that Mr Sapstead unreasonably completed the accident form and I do not accept that there is evidence that he bullied and pressurised her to return to work or to undertake an occupational health report unreasonably. I do not accept that there is evidence that Mr Sapstead questioned the advice of the Claimant's GP and specialist or that he breached the Claimant's confidentiality in that meeting.

52. That leaves the allegation that Mr Sapstead shouted and was aggressive towards the Claimant at a meeting on 3 February 2021. This was an incident which took place in the control room on 3 February 2021. Only Mr Sapstead and Ms Mansfield were present during the discussion and their evidence is contradictory. The meeting concerned the fact that the Claimant had, by that time, lodged a grievance and that Mr Cloke was going to hear that grievance. He asked Mr Sapstead to arrange a venue. Mr Sapstead met with the Claimant on 3 February and told her that the post room was ready for such a hearing and that he would ensure that no one entered the room and it would be private. The Claimant was unhappy with this as she said she wanted to pursue a video conference. I accept that Mr Sapstead's version of events, which, to an extent, is supported by Mr Cloke, as during the course of that conversation where I accept that it was the Claimant and not Mr Sapstead who became heated, Mr Sapstead

rang Mr Cloke and handed the phone to the Claimant for her to speak to Mr Cloke. Mr Cloke, in his evidence, accepts that it was the Claimant who was upset and agitated at that time although the phone call appears to have been short as they were cut off.

53. Where there is a dispute, I accept the evidence of Mr Sapstead as to what took place on 3 February.

54. The Claimant also seeks to rely upon the conduct of the grievance process which was initiated when she raised the grievance pursuant to her unhappiness after the meeting with Mr Lacey and the attempts to complete the return to work form. That she raised a number of issues in that grievance complaint, including the attempts to persuade her to undergo an occupational health report and the issues concerning the days' holiday and the minor issue with her pay. She raised these complaints in an email to Mr Cloke. This was during a period when she was having some correspondence with Mr Cloke about the payroll issue she was concerned about.

55. Mr Cloke dealt with the grievance and, of course, the arrangements caused the difficulties mentioned above which took place at the meeting on 3 February 2021. It was on that day that the Claimant then left her post during shift for some two hours. This subsequently formed the basis for the disciplinary process that was initiated against the Claimant and which she relies upon as being the last straw.

56. The grievance was heard on 4 February. There were six elements to the grievance. He interviewed all those at the Respondents who could give evidence and throw light on the issues raised in the Claimant's grievance. He reviewed each of the Claimant's complaints and responded with a grievance outcome. He upheld two aspects of her grievance, namely, the holiday day wrongly attributed to her and the £2.14 underpayment. He did not uphold other aspects of her grievance.

57. Pursuant to the incident on 3 February and the fact that the Claimant left her post during shift for two hours, the Respondents initiated a disciplinary process.

58. Pursuant to the outcome of a disciplinary investigation, the Respondents then initiated a disciplinary process. Paul Tyce conducted the investigatory meeting on 18 February 2021. The reason for the meeting was the Claimant leaving the work station on 3 February 2021 for a period of approximately 2 hours without prior authorisation. This was, of course, pursuant to the altercation she had with Gary Sapstead.

59. The meeting on 18 February 2021 took place via a telephone conference call. Mr Tyce interviewed the Claimant and Gary Sapstead in connection with the incident on 3 February. He accepted that there was a different version of events put forward of that incident by both protagonists but took the view that was not in doubt was the fact that the Claimant was away from her post for some two hours without permission. He therefore

considered there was sufficient evidence to refer the matter for a full disciplinary hearing. This was to be conducted by Andy Crowhurst.

60. The Claimant was required to attend a disciplinary hearing by conference call on 25 February 2021. She replied, indicating that her chosen Representative could not attend on the chosen date. While she did not explain the name of her work colleague by whom she wished to be accompanied, she indicated that her colleague was not on shift on 25 February. The disciplinary hearing was postponed and re-arranged for 3 March 2021. This was despite the fact that the Claimant indicated that her chosen Representative could not be available on that day.

61. It is not in dispute that the Claimant was away from her post for approximately two hours on 3 February. It is not in dispute that she worked at a high security air base where top secret material is handled. It is an RAF base. Her terms of employment make it clear that leaving one's post unmanned is a matter of the upmost seriousness and potentially gross misconduct which could result in summary dismissal.

62. The Claimant says she had good reason and mitigation for leaving her post as a result of the altercation with Gary Sapstead. She says that, failure to take this into account is part of the reason why she considers the disciplinary process to be unreasonable.

63. The Claimant also complains that she was denied the right to be accompanied at an investigatory meeting and ultimately at the disciplinary hearing which was arranged. It is a fact that under paragraph 4 of the ACAS Code of Conduct of Disciplinary and Grievance Meetings, an employee is not entitled to be accompanied at an investigation meeting.

64. Moreover, paragraph 16 of the Code states that an adjournment of not more than five working days is permitted for the purpose of securing an accompanying colleague who may not be available at the first scheduled disciplinary hearing. It is not in dispute that the Respondents are not in breach of either of these provisions.

65. Nevertheless, prior to the disciplinary hearing taking place, the Claimant resigned by way of a letter sent by email dated 2 March 2021.

66. The letter read simply as follows:

> "Please accept this letter as formal notice of my resignation from my position as security officer with Corps Security with immediate effect, Tuesday March 2 2021".

67. It is the Claimant's position that she resigned in reliance on the alleged breaches she relies upon and in particular upon the last straw being the alleged unreasonableness of the disciplinary process. Key amongst this, in the submissions I heard from Mrs May, was the fact that she was not going to be permitted to be accompanied at the rescheduled disciplinary hearing on 3 March. I am referred by Mrs May to the ACAS Guide on Discipline and Grievance at Work, page 25, which suggests that strict compliance with the Code allowing a reasonable time for a disciplinary to

be delayed when an accompanying colleague is not available and restricts that reasonable time to five working days, should, in instances where the disciplinary process may result in dismissal, be something which an employer may wish to allow more time for a rearranged meeting. She also refers me to the case of Talon Engineering Ltd v Smith [2008] UK EAT/0236/17/BA which I refer to later in this judgment.

68. The Claimant was then able to secure fresh work very quickly. During cross-examination there was some doubt about when the Claimant applied for the new job and whether she resigned in reliance upon the alleged breaches or because actually she had found new work.

69. Her resignation was brief and makes no mention of the breaches she now relies upon.

70. Once again I found her evidence, when cross examined on this point, to be unclear. She appeared to be seeking to avoid the question.

71. When I asked her why she had not set out the reasons for her resignation in her letter, which she now relies upon, she said that she didn't want it to come back on her. She said she wanted to get a good reference. I asked her whether she had a new job lined up and she said no. She said she couldn't remember when she started the new job. What is clear is that she worked 139 hours in her new job between 2 March and 26 March. She then said she thinks she started her new job in the second week in March.

72. She was asked whether she had a new job lined up before she chose to resign and she said she didn't. Under further cross-examination, however, she argued that she did know about the new job but hadn't received a formal offer prior to her resignation. She admitted that the reason she resigned was because she thought she was going to be dismissed at the disciplinary hearing.

73. I am unimpressed by this aspect of her evidence. I accept that she was worried and concerned about the upcoming disciplinary hearing and that she expected to be dismissed. No one can know whether she would have been or not as she chose to resign prior to the disciplinary hearing.

74. She was clearly unhappy at the time but as a matter of fact, I find, that the reason she resigned was that she was concerned that she maybe dismissed and that she had a very strong prospect of finding alternative work, which she appears to have done extremely quickly after her resignation.

75. I therefore do not consider that she resigned for the reasons which she has suggested in these proceedings. On the balance of probability, I consider that she resigned for the reasons I have suggested above.

The Law

76. I am very grateful to Ms Scarborough for her detailed exposition of the law on constructive dismissal set out in her skeleton argument. This is not demurred from by Mrs May who agrees that this sets out the law.

77. A constructive dismissal is a dismissal by virtue of s.95(1)(c) of the Employment Rights Act 1996 which states that it is a dismissal when the employee terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. The burden of proof remains on the Claimant and if he or she is to succeed they must prove three things:

    a. That there was a fundamental breach of the employment contract by the employer;
    b. That the employee resigned in response to that fundamental breach; and
    c. That the employer did not delay too long in resigning to the response to the breach and affirm the contract.

78. Tribunals are guided by a number of authorities in considering the threshold as to whether a breach of contract is repudiatory or not. The leading case remains in a Lord Denning case where Lord Denning was Master of the Rolls in his Court of Appeal case called Western Excavating (ECC) Ltd v Sharp [1978] ICR221. Lord Denning summarises the position as follows:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed".

79. In this case the Claimant relies on the implied term of trust and confidence. The case of Woods v W M Car Services (Peterborough) Ltd [1981] ICR666 Brown Wilkinson J, tells us:

> "In our view, it is clearly established that there is implied, in a contract of employment a term, that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

80. Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84 tells us:

> "To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract, the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

81. Unreasonable behaviour by an employer is not in, and of itself, a repudiatory breach of contract and cannot, by itself, found a basis of a claim for constructive dismissal unless that unreasonableness also satisfies the test for a repudiatory breach.

Last straw cases.

82. This is a last straw case. I am referred to the case of Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ978.

83. The Claimant must prove that the event that caused them to resign contributed to a series of events which, taken as a whole, amount to a repudiatory breach of contract.

84. Kaur also refers to the case of Omilaju [2005] ICR481, which says that the Act being relied upon as the last straw must be a course of conduct comprising several Acts and omissions which, viewed cumulatively, amount to a repudiatory breach.

85. As always, it must be remembered that the employee must resign in response, or at least partly in response, to that breach.

86. Omilaju points out that if the final straw is not capable of contributing to a series of earlier Acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. It says that, suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he relies is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

87. It follows, therefore, that the last straw must not be entirely innocuous and be related in some way to the obligation of trust and confidence. The test in respect of this remains an objective one and it is not sufficient that the Claimant perceives the act in such a way. It must be judged reasonably and sensibly as having contributed to the fundamental breach.

88. In this case the Claimant relies on alleged breaches of the implied term of mutual trust and confidence. The nature of that implied term is described in Courthauld Northern Textiles Ltd v Andrew [1979] IRLR84. It is described as the employer without reasonable and proper cause conducting itself in a manner calculated or likely to destroy or seriously

damage the relationship of confidence and trust between the parties. In this case it must be shown:

a. That the employer had no objectively reasonable and proper cause for behaving as they did; and
b. That their behaviour was calculated or likely to destroy or seriously damage the relationship of confidence and trust.

89. I am also referred to two further cases by Mrs May. The first of these is John Craig v Abellio Ltd EAT2020/001012/AT. In this case Gavin Mansfield QC, sitting as a Deputy Judge at the High Court, overturned a decision of the Tribunal which found against the Claimant, claiming constructive dismissal. The Claimant had experienced a series of problems with hours and pay when on sickness absence and the incorrect level of sick pay was pointed out by the Claimant and the employer failed to rectify those errors. This resulted in an underpayment in the sum £6000.00 in back pay. The promised back pay was not paid by the due date. The Claimant resigned, claiming that the failure to pay the back pay on the due date was the last straw in a pattern of treatment of him. Mrs May seeks to compare this case with the facts before me in the present case.

90. She also refers me to the case of Talon Engineering Ltd v Mrs V Smith UKEAT/0236/17/BA. This was a judgment of her Honour Judge Stacey sitting alone. Here, the Judge found that the Employment Tribunal was entitled to find that a Claimant employee had been unfairly dismissed when the Respondent employer refused a request to postpone a disciplinary hearing for two weeks to enable the Claimant's full time Union Official to accompany her at the hearing. She said that the refusal of the postponement request did not breach the Claimant's accompanying rights under s.10(5) but that did not affect the fairness of the decision. The provisions of s.10 do not act as a fetter on the Tribunal's discretion or circumvent the meaning of words of s.98(4) of the Employment Rights Act 1996.

91. Mrs May invites me to consider this case when assessing the question of the final straw being the refusal of the Respondents to delay the disciplinary hearing beyond the five working day period, recommended by the ACAS Code of Conduct.

Submissions

92. I had detailed written submissions from both advocates before the parties to which I am most grateful. Ms Scarborough's run to some 17 pages and I am asked to read those in conjunction with Ms Scarborough's opening note which ran to 9 pages. Submissions from Ms May for the Claimant run to some 26 pages. I do not propose to repeat those submissions here verbatim, although I have referred to them, where appropriate, throughout this judgment.

Conclusions

93. I have made findings of fact in detail. I have commented upon each of the alleged breaches the Claimant relies upon and made findings of fact in respect of them including the final breach relied upon which is also relied upon as the last straw.

94. I will not repeat those findings of fact but it is important that in these conclusions I deal with each of those alleged breaches in turn.

Poor treatment of the Claimant in relation to her sick leave

a. **Failing to pay her in full for October 2021 and the lost holiday day**.

The Respondents accept that there was a de minimis unintentional deduction from wages of pay of £2.14 and ultimately the Respondent's accepted that there had been a lost holiday day as a day when the Claimant was off sick had been designated as holiday and there was great difficulty in unravelling that on the system. Ultimately, the underpayment was rectified and the holiday day was given back to the Claimant by way of an extra days' holiday. This was all set out in the grievance letter on 26 February 2021 from Paul Cloke.

I accept that in an ideal world, these very minor issues could, and perhaps should, have been rectified earlier than this. The Claimant had raised them previously and they could have been dealt with sooner. However, they were minor. The Claimant has not, at any stage, indicated that she relies upon the £2.14 deduction as a separate breach. The holiday issue was minor involving one day and it was simply a mistake which was ultimately rectified. Even taking into account the delays involved and taking the Claimant's case at its highest, viewed objectively, neither the lost holiday day or the underpayment can, individually or collectively, constitute a fundamental breach as is required. Viewed objectively, the Respondent's behaviour was not calculated or likely to seriously damage the relationship of trust and confidence. The consequences to the Claimant were de minimis. The fact that she, herself, subjectively considered the lost holiday day to be a significant issue and does not mean that it amounts to a repudiatory breach.

b. **Failing to respond to emails and telephone calls.**

There is evidence that Jake Lacey did fail to respond to the Claimant in relation to the lost holiday day. However, the Respondents generally did ultimately deal with the issue. The issue was so minor that it is not surprising, in a busy workplace, that on occasion an individual such as Mr Lacey, with the responsibilities that he had to discharge as part of his role, would fail to pick up and deal with such a minor issue. Ultimately it was dealt with by someone else. The evidence before me suggests that generally the Respondents were responsive to emails

and telephone calls from the Claimant and there is truth in the fact, as pointed our by Ms Scarborough, that the Claimant somewhat guilded the lily in her evidence when in reality she had received responses but had just not liked the contents of them.

I accept Ms Scarborough's submissions that, viewed objectively as a whole, the picture before me is of a Respondent that is responsive and genuinely engaged with trying to resolve issues raised by the Claimant. It cannot, in my judgment, be viewed as behaviour calculated or likely to damage the relationship of trust and confidence. This cannot, therefore individually or cumulatively pass the necessary threshold required.

c. **Pressurising Ms Mansfield to return to work when she was not ready to do so.**

I accept the submissions of Ms Scarborough that there was no evidence to support an assertion that the Claimant was objectively pressurised to return to work. Reasonable enquiries were made in respect of Doctor's notes when they were due to run out. The Respondents necessarily require to know if the Claimant would, or would not be returning to work. This may subjectively have upset the Claimant but objectively, reasonable and necessary enquiries of this nature could not constitute a fundamental breach. Such behaviour is not calculated or likely to seriously damage the relationship of trust and confidence between the parties.

d. **Questioning the authenticity of sicknotes.**

The Claimant's issue here is based upon the fact that she was asked to undertake an occupational health assessment. The Claimant returned to work at the beginning of December and produced a further sick note in January 2021, indicating that she would be limited due to chronic back pain until at least the end of January. I do not accept that there has been any evidence before me that the requirement for, or the request to the Claimant to undergo an occupational health assessment, amounts to the Respondent's questioning the authenticity of the Claimant's sick notes. It seems to be entirely reasonable that a responsible Respondent would want to have specialist advice from those experienced in workplace adjustments so that they can best accommodate the Claimant's needs. In my judgment, this was an entirely reasonable course of action and could not, under any circumstances, be viewed as an action on behalf of the Respondent, calculated or likely to seriously damage the relationship of trust and confidence between the parties.

e. **The alleged poor treatment of Mr Sapstead of the Claimant**

Failure to complete return form correctly

I accept that on the basis of the evidence I have heard, Ms Scarborough is correct in that the evidence does not support the Claimant's version of events. There is no materially incorrect information on the form save for the fact that it does not record there were witnesses present when the Claimant injured her back on the heavy vault door. In his evidence, which I accept Mr Sapstead explained that he did this at the time. He has never subsequently denied that witnesses were present. The Respondents have not disputed the Claimant's version of events. This omission from the form is of no consequence and has no effect. It is a trivial omission. It amounts to a minor inaccuracy and no more. It could not, of itself or cumulatively, amount to a fundamental breach and, taken objectively, cannot be deemed to be likely or seriously damage the relationship of trust and confidence between the parties.

f. **Mr Sapstead pressing the Claimant to return to work in October/November**

As mentioned above, there is no evidence to support this. The Claimant communicated with Jake Lacey during her sickness absence. There is no evidence that she was pressurised to return to work. Reasonable enquiries were made of her but this does not amount to the pressure the Claimant alleges.

g. **Unreasonably questioning the advice of the Claimant's GP and psychiatrist.**

This is based once again on the fact that the Claimant was requested to attend an occupational health assessment. This does not amount to unreasonably questioning the advice of the Appellant's GP and psychiatrist.

h. **Breaching the Claimant's confidentiality (in relation to having Ms Titmarsh present when she was asked to undertake an OH assessment in January 2021).**

This appeared to be a relatively informal meeting when Mr Sapstead asked the Claimant to attend the control room to fill out a form. The Claimant's objection appears to be that Ms Titmarsh was present and that this, in some way, breached her confidentiality. Ms Titmarsh was there as an independent witness and also to run the control room. The Claimant had raised complaints about the behaviour of the Respondent's employees at that time and had found the request to fill in the return to work form distressing. The Claimant made no objection to Ms Titmarsh's presence at the time. Nothing detailed or confidential was discussed in front of Ms Titmarsh so to suggest that this amounts to a breach, taken individually or cumulatively, sufficient to constitute a constructive dismissal, cannot be supported. Viewed objectively, the request was simply routine and cannot be regarded as having been calculated or likely to seriously damage the relationship of trust and

confidence, even though the Claimant might have considered, subjectively, that it did so.

i. **The altercation in the control room on 3 February 2021**

This was an incident which clearly significantly upset the Claimant. That is not in any doubt. However, based on the evidence before me I have to determine whether it constitutes sufficient to, individually or cumulatively, constitute a repudiatory breach on the basis I have set out. Mr Sapstead and the Claimant give two versions of what took place. As I have indicted, I treat the Claimant's evidence with some caution. Only the Claimant and Mr Sapstead were present at the time. On balance, I therefore prefer the evidence of Mr Sapstead. This is, to an extent, corroborated by Mr Cloke as a result of a telephone call and accordingly, and on this basis, I cannot find that this constituted behaviour of the Respondent's calculated or likely to seriously damage their relationship of trust and confidence between the parties.

If, and insofar as it is alleged that the Claimant's confidentiality was breached by the Respondents, I do not accept that it was. She was able to conduct her grievance meeting in a private room.

j. **Conduct of the grievance procedure.**

Taken objectively and as a whole, the grievance procedure conducted by Mr Cloke was reasonable and that of a responsible employer. Parts of her grievance were upheld and she lodged no appeal to the grievance. It could be said that aspects dealt with in the grievance could perhaps have been dealt with earlier but the conduct of such procedures, in such circumstances, is not a counsel of perfection. Viewed objectively, the grievance was conducted reasonably, thoroughly and in line with best practice. The Claimant was given every opportunity to put her case and have her grievance issues examined. There is nothing in this grievance process which approaches the threshold required to satisfy the test that it amounted to behaviour calculated or likely to seriously damage the relationship of trust and confidence between the parties.

k. **Conduct of the disciplinary procedure**.

The Claimant relies upon the Respondent's disciplinary procedure as constituting the last straw in a sequence of breaches which triggers the repudiatory breach and entitles her to claim constructive dismissal. There is nothing in the fact that the Respondents initiated a disciplinary procedure and went through an investigatory process and scheduled a disciplinary hearing that could constitute behaviour calculated or likely to seriously damage the relationship of trust and confidence between the parties. The Claimant had, by her own admission, left the control room for more than two hours. Her conditions of employment specify

that this is a potentially serious misconduct issue. The issue she relies upon appears to be that she had good reason and justification for leaving her post. Well that was something she would have been able to argue and put at her disciplinary hearing, yet she decided to resign prior to it taking place. That is the purpose of disciplinary hearings to examine potential misconduct and listen carefully to explanations for any such conduct. There is no evidence that the outcome of that disciplinary hearing was pre-determined.

Nothing in the way in which that disciplinary process was conducted was a breach of s.10 of the Employment Relations Act and the employer's right to be accompanied at a disciplinary hearing or, was at variance with the ACAS Code on Disciplinary and Grievance Procedures. The Claimant is particularly exercised by the fact that when the disciplinary hearing was arranged, she asked for delay due to the unavailability of the individual who was to be accompanied by and a delay was allowed but only five working days, as envisaged by the Code and no more. The Respondents were therefore in line with their own disciplinary procedure which reflected the Code and the Statutory Code.

95. I am referred by Ms May to the case of Talon Engineering Ltd v Smith but I am with Ms Scarborough in this respect in that this case in not on all fours with the present case. That was a case of unfair dismissal. This is a case of constructive dismissal and the Claimant has a burden to discharge which, in my judgment, she has not done so. The Respondents did not deny her the right to be accompanied and did agree to a delay, albeit they did not agree to a lengthier delay and restricted the delay to the time specified in the Code and in their own disciplinary procedure. They did nothing which constitutes sufficient to cross the threshold required to constitute a repudiatory breach, either individually or as a last straw in a series or breaches. That case is very different and is not a constructive dismissal case.

96. I have read the part of the ACAS Code to which I have been referred by Ms May and the suggestion that employers may, however, wish to allow more time than the five working days set out in the Code but the failure to do that does not, in my judgment, constitute sufficient to cross the threshold I have mentioned.

97. I have also considered the other case referred to me by Ms May being the case of John Graig v Abellio Ltd [2002] EAT 43. This is also a case which is not on all fours with this one, albeit that it was a constructive dismissal case, the failures in that case were infinitely more serious in terms of underpayment. The underpayment in this case and the lost holiday day was de minimis.

98. For the reasons I have therefore set out, none of the breaches relied upon by the Claimant can constitute, individually or collectively, breaches which entitle the Claimant to treat herself as dismissed. None of them passed

the test as set out that when viewed objectively, they amount to behaviour, calculated or likely to damage the relationship of trust and confidence between the parties. The Claimant is therefore not entitled to resign in respect of one,or more of them or all of them.

99. For the avoidance of doubt, however, even if I had concluded that the facts Acts relied upon by the Claimant constituted, either individually or accumulatively, a sufficient breach to enable the Claimant to claim constructive dismissal she did not, as a matter of fact, resign in reliance upon them. Even in part. On her own evidence she resigned because she thought she would be dismissed and I have made a finding of fact that it was a combination of that and the fact that she had significant expectation of other work that she decided to resign.

100. For the reasons set out above, the Claimant's case fails and is dismissed.

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Employment Judge K J Palmer

Date: 14 November 2023

Sent to the parties on:
5 December 2023

For the Tribunal Office